GOVERNMENT OF MALAYSIA

v.

KOH KIM CHAI

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CIVIL SUIT NO. 469/1975]
9 NOVEMBER 1982

ADMINISTRATIVE LAW: *Application to set aside final judgment - Right to be heard - Leave to sign final judgment in absence of defendant - No reply to appeal against decision.*

The plaintiff claimed for additional income tax. A statement of defence was filed but the plaintiff applied for summary judgment under O. 14, Rules of the Supreme Court 1957. The hearing of the application was postponed but on the latter date of hearing, it was not listed in the cause list. The Senior Assistant Registrar granted leave to the applicant to sign final judgment against the defendant in his absence. On being informed by telephone of the order, the defendant filed a notice of appeal but received no reply at all but instead received a letter from the Senior Assistant Registrar confirming the final judgment. The defendant applied to set aside the final judgment.

Held:

[1] The defendant had sufficient cause for not appearing when the plaintiff's application was called for hearing on the resumed date. There was a serious irregularity. (*Anlaby and Ors. v. Praetorius* [1888] 20 QBD 764).

[2] The judgment was not properly obtained as the defendant was not given a chance to be heard. A man should have a fair chance to state his case. The Courts are cautious and jealous of the rights of the parties not before the Court. (*Eu Hoong Chwee v. Chua Say Tiong* [1968] 2 MLJ 12 distinguished; *R. v. Malborough Street Magistrate* [1974] CR. LR 47 applied; *Baring Bros. v. ICI Pension Fund Security ltd.* [1974] 119 SJ 48).

[Application allowed.]

Cases referred to:

Eu Hoong Chwee v. Chua Say Tiong [1968] 2 MLJ 12
R. v. Malborough Street Magistrate [1974] CR LR 47
Baring Bros. Ltd. v. ICI Pension Fund Security Ltd. [1974] 119 SJ 48
Analby & Ors. v. Praetorius [1888] 20 QBD 764

Legislation referred to:

Rules of the Supreme Court 1957, O. 14

For the plaintiff - Zulkifli b. Ahmad Makinudin FC.
For the defendants - Koh Kim Chai; M/s K.C. Koh & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

This is an application by the defendant to set aside final judgment granted by the Senior Assistant Registrar during the absence of the defendant on ground that the defendant was not given a chance of being heard.

Facts of the application as stated in affidavit in support thereof show that the defendant had entered an appearance to the claim by the plaintiff for additional income tax for the years 1970 to 1974. A statement of defence was filed on 14 June 1976 but on 20 July 1976, the plaintiff applied for summary judgment under O. 14 of the Rules of the Supreme Court 1957. The application was scheduled for hearing by the Senior Assistant Registrar on 11 October 1976. This was postponed to 22 November 1976. On the latter date of hearing, the application was not listed in the cause list. However, on the same morning (22 November 1976), the defendant appeared before the Senior Assistant Registrar on another matter which had been listed in the cause list. While the defendant was in Court, he was not informed that this pending application under O. 14, Rules of the Supreme Court 1957 would be heard by the Senior Assistant Registrar. After the defendant had left, the plaintiff's application was called. The Senior Assistant Registrar granted leave to the applicant to sign final judgment against him in the absence of the defendant and the defendant was informed by telephone of Order.

The defendant, on the following day, 23 November 1976, filed a notice of appeal against the decision of the Senior Assistant Registrar. Nothing was heard from the Registry regarding this appeal and on 11 December 1976, a reminder was sent by the defendant. No reply was received on the reminder from the Registry. On 2 February 1977, the defendant received a letter from the Senior Assistant Registrar confirming that the final judgment was given in the matter against him.

The defendant's appeal was not disposed even to this day. He made representation to the Income Tax Department and he was assured that he need not have to worry and that the matter was being looked into. Finally, the defendant made this application, to set aside the order granted by the Senior Assistant Registrar on 22 November 1976.

No affidavit in reply was filed by the plaintiff.

In opposing the application, the plaintiff referred to *Eu Hoong Chwee v. Chua Say Tiong* [1968] 2 MLJ 12 contending that the Court there had refused application of similar nature.

Eu Hoong Chwee's case is distinguishable. The facts there are poles apart from the present case. There the defendant had asked for postponement of the plaintiff's application contending that the matter was settled. The plaintiff did not confirm his contention and the Senior Assistant Registrar there refused postponement. On the date of hearing, the defendant was absent and the Senior Assistant Registrar granted leave to the plaintiff to sign final judgment. The defendant's application to set aside was also found to be *mala fides* and his application was dismissed.

The issue here is simply whether the judgment was regularly obtained when the defendant was not given a chance of being heard. In *R. v. Malborough Street Magistrate* [1974] CR. LR. 47, it was held that a man should have a fair chance to state his own case and breach of the rules of natural justice was found where the defendant was refused leave to comment on the case.

The Courts were always cautious and jealous of the rights of the parties not before the Court - *Baring Bros, Ltd. v. ICI Pension Fund Security Ltd.* [1974] 119 SJ 48. I am satisfied that the defendant had sufficient cause for not appearing when the plaintiff's application was called for hearing on the resumed date and the judgment given against him. There was a serious irregularity. See - *Anlaby & Ors. v. Praetorius* [1888] 20 QBD 764.

For these reasons, I allowed this application to set aside the judgment obtained by the plaintiff on 22 November 1976 with costs.

Also found at [1983] 2 CLJ 138